

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940/1941

No. 904/43

JIM DUCKWORTH, APPELLANT,

vs.

THE STATE OF ARKANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

FILED MARCH 31, 1941.

SUPREME COURT OF THE UNITED STATES

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[fol. 1] **IN THE SUPREME COURT OF ARKANSAS****JIM DUCKWORTH, Appellant,**

vs.

THE STATE OF ARKANSAS, Appellee**PRAECLPIE FOR RECORD—Filed March 18, 1941**

To the Clerk of the Supreme Court of the State of Arkansas:

In making up the record in the above captioned cause upon the appeal to the Supreme Court of the United States, you will include the following:

1. The entire record sent up from the Circuit Court of Mississippi County, to the Supreme Court of Arkansas.
2. The opinion of the Supreme Court of Arkansas.
3. The decree of the Supreme Court of Arkansas.
4. The Petition for Appeal to the Supreme Court of the United States.
5. The Order Allowing the Appeal.
6. The Jurisdictional Statement.
7. The Assignments of Error.
8. The Citation to the Appellee.
9. The Acknowledgement of Service by the Appellee of the documents relating to the appeal.
10. The Appeal Bond.
11. This Praeclipe.

(S.) Harold R. Ratcliff, Cecil Nance, Counsel for Appellant.

[File endorsement omitted.]

[fol. 2]

[Caption omitted]

[fol. 3-4] IN THE MUNICIPAL COURT OF BLYTHEVILLE, ARKANSAS, CRIMINAL DIVISION**STATE OF ARKANSAS**

vs.

JIM DUCKWORTH**JUDGMENT—December 16, 1940**

On the 16 day of Dec. 1940, before Hon. Doyle Henderson, Judge of the Municipal Court of Blytheville, Arkansas,

came the defendant Jim Duckworth, charged with the offence of Transporting Alcoholic Liquor into the State without Permit (See. 14177 Pope's Digest). Said defendant being then before the court, in custody of the officer, and after hearing the charge entered a plea of not guilty and announced ready for trial, the witnesses were sworn and the court proceeded with the trial. After hearing all the evidence for and against the said defendant, the court found the said defendant guilty as charged and assessed against him a fine of \$500.00 Dollars, and cost of \$20.25, and — day's confinement.

Now on this 16 day of Dec., 1940, within apt time comes the defendant, by his attorney, Cecil Nance and H. R. Ratcliff and prays an appeal to the Circuit Court, which is by the court granted, and the appeal bond fixed at \$1000.00 Dollars.

The defendant having given the required bond with — and — as sureties thereon, the defendant was ordered released from custody to await his case on appeal.

Clerk's Certificate to foregoing paper omitted in printing.

[fols. 5-6] IN THE MUNICIPAL COURT OF BLYTHEVILLE, ARKANSAS

WARRANT OF ARREST

The State of Arkansas to any Sheriff, Constable, Coroner or Policeman in the State:

It appearing that there are reasonable grounds for believing that Jim Duckworth has committed the offence of Transporting Alcoholic Liquor into the State without Permit (See. 14177 Pope's) in the Chickasawba District, County of Mississippi and the State of Arkansas, you are therefore commanded forthwith to arrest him-her and bring him-her before the municipal court, to be dealt with according to law.

Given under my hand, as Clerk of the Municipal Court, Blytheville, Ark., this 12 day of Dec., 1940.

F. Whitworth, Municipal Court Clerk.

Summons as witnesses for the State: E. B. Davis. —, Municipal Court Clerk.

[fol. 7] IN THE CIRCUIT COURT OF MISSISSIPPI COUNTY, AR-KANSAS

AGREED STATEMENT OF THE FACTS

The above entitled cause was submitted to the Court on the following stipulation:

It is agreed and stipulated by and between the parties hereto that Eddie B. David, if present, would testify as follows; to-wit: That he is an Arkansas State Policeman, and that in the discharge of his duty on Wednesday, December 11th, 1940, in the Chickasawba District of Mississippi County, on Highway 61, he stopped a 1940 model Chevrolet truck being driven by the defendant, Jim Duckworth, and which contained 100 cases of liquor; that there was at the time on the truck Arkansas license displayed and upon an investigation and search of the truck he found Mississippi license under the floor mat in the front compartment of the truck. In the glove compartment of the truck he found four half pints of liquor, one of which was opened and a portion gone. There was no Arkansas Revenue liquor stamps or any other state liquor stamps, upon any of the whiskey, either that contained in the cases of that which he found in the front compartment of the truck. There was no stamp of any kind on the whiskey except the United States Revenue stamp. The United States Internal Revenue was affixed to each bottle of whiskey in each instance. That in the possession of the said Jim Duckworth was found an invoice billed to Jack Spiers, Columbia, Mississippi, which invoice is attached hereto and made a part hereof. The truck in question was proceeding southwardly along the highway and actually in motion at the time it was stopped and the driver thereof informed the witnesses that he was en route to Columbia, Mississippi, with the shipment. The witness, if present, would testify that he of his own personal knowledge knows nothing with reference to [fol. 8] the destination of the liquor. He was told by the defendant, Duckworth, that the liquor had been purchased at Cairo, Illinois, and that he did not own the liquor, and was driving for Spiers. Defendant said further that he had made several trips through here with loads of liquor, and that he had no permit of any kind from the Revenue Department of the State of Arkansas. The witness would

further testify that Duckworth told him that he knew that he was hauling liquor in violation of the State law. That the Mississippi plate was a 1941 plate and that it showed use. The witness would testify that the truck was checked for registration and found that the Arkansas license on the truck was issued to Jack Spiers, Columbia, Mississippi, for the 1940 Chevrolet one ton truck, and the truck was correctly licensed under the Arkansas law.

It is agreed and stipulated by and between the parties hereto that Jack Spiers, if present, would testify that he is in the wholesale whiskey business, with place of business known as Club Marion in Columbia, Mississippi. That he holds a Federal Wholesale Liquor Dealer's Permit. That he is the owner of the truck and the whiskey in question. That he sent the defendant, Jim Duckworth, from Columbia, Mississippi, with the truck with instructions to purchase the whiskey which was contained therein at the time of the arrest from a licensed dealer in Cairo, Illinois. That his instructions to Duckworth were to make the purchase of the whiskey in question, and bring the same, together with the truck, to the said Club Marion, at Columbia, Mississippi. That no part of the said whiskey was intended for sale, gift, distribution, or other disposition within the State of Arkansas. On cross examination witness testified that the liquor was intended to be sold in the State of Mississippi in violation of the State laws of Mississippi. That the Mississippi license plate found in the truck was purchased for the particular truck and there was no place [fol. 9] to attach the same on the truck other than by bolting it to the Arkansas plate already on the truck. Both the defendant and the owner of the truck reside in Mississippi and neither has any place of business whatsoever in the State of Arkansas.

Customer's Copy.

Royal Distillers Products

Imported—Domestic

Wines

Wholesale Liquor Dealers

Liquors

706 Commercial Avenue

Telephone 97.

Cairo, Illinois, December 10, 1940.

Sold to Jack Spiers.

Address: —.

City: Columbia; State: Miss.

Federal Permit No. —. State Permit No. —.

Shipped Via —.

Terms: —.

Cases	Sizes	Brand	Price	Amount
50	½	Paul Jones	18.75	937.50
25	Pts	Paul Jones	18.00	450.00
25	½	O. P. Stock	12.15	303.75
100 Cases			Total	1,691.25

AFFIDAVIT

STATE OF ILLINOIS,

Alexander County, ss:

Affiant (Purchaser or purchaser's agent) states that he has examined the foregoing invoice and that each and every statement contained therein is correct and true, affiant further states that he has carefully read this said affidavit, before signing and is acquainted with all the contents of same, affiant further states that the purchaser whose name appears above is the holder of a federal permit or stamp in the state of Mississippi. Affiant further states that all liquors purchased per this invoice are for consumption outside the state of Illinois and will in no instance be sold or otherwise used in the state of Illinois nor will purchaser permit any of liquor to return to Illinois and that all the contents of the above bill will be taken directly to the purchasers place of business as is shown above.

Affiant (Purchaser or purchaser's agent) as shown by signature below hereby swears that the facts that are set

forth as above is the whole truth and nothing but the truth.

Signature of Purchaser: — — —, by — — —,
Agent.

Subscribed and sworn to before me this — day of
—, 194—. — — —, Notary Public.

Received by —. No. 532. Federal Stamps Only.

[fol.11] Jack Spiers, Columbia, Miss.

50 1/2 Paul Jones - C339934 - 340007 - 163 - 018 - 300724
- 232946 - 56 - 898 - 83 - 340158 - 072 - 014 - 332895 -
88 - 93 - 314710 - 01 - 07 - 08 - 33 - 04 - 05 - 23 - 688 -
91 - 93 - 87 - 730 - 720 - 719 - 32 - 22 - 35 - 36 - 690 -
98 - 712 - 34 - 29 - 24 - 731 - 26 - 706 - NoNo - 694 -
90 - 95 - 92 - 97 - 89.

18.75

25 Pt. Paul - 471075 - 017 - 36 - 71 - 79 -
62 - 44 - 51 - 68 - 64 - 74 - 38 - 37 - 63 - 66 -
76 - 54 - 72 - 14 - 65 - 69 - 29 - 23 - 42 - 70.

18.00

25 1/2 Our Private Stock. 23437E - 351 - 68 - 431 -
359 - 436 - 365 - 58 - 361 - 53 - 55 - 43 - 54 - 56 -
47 - 39 - 60 - 30 - 75 - 67 - 52 - 57 - 36 - 66 - 74.

12.15

—
100
Cases

This was all of the evidence adduced by either the plaintiff or the defendant in the trial of the above entitled cause.

(See Clerk's transcript for judgment and finding of the Court.)

[fol. 12] Thereafter, on the 19th day of December, 1940, the following motion for new trial was filed by the defendant: (See Clerk's transcript for motion and order overruling same.)

Reporter's Certificate to foregoing proceedings omitted in printing.

[fol. 13] IN THE CIRCUIT COURT OF MISSISSIPPI COUNTY

ORDER APPROVING BILL OF EXCEPTIONS—January 4, 1941

And now on this day comes the defendant herein and presents this, his bill of exceptions, to the Judge trying said cause, in vacation, and prays that the same be by the Judge examined and approved; and the Judge, after an examination of same, doth sign and approve said bill of exceptions, and doth order that the same be by the Clerk filed and made a part of the record herein.

In Witness Whereof, I have hereunto set my hand on this the 4 day of January, 1941.

(S.) G. E. Keck, Judge.

[fol. 14] IN THE CIRCUIT COURT OF MISSISSIPPI COUNTY

[Title omitted]

Date & Term	DOCKET ENTRIES	Record
	Orders of Court	Vol. Page
12/16/40 Dec. 16, 1940	Appeal transcript filed. By agreement of all parties case to be tried before Court without jury. Trial before Court, finding and judgment finding defendant guilty of transporting alcoholic liquor into state without permit as charged. Punishment fixed at fine of \$500 and costs. Officers directed to release truck and liquor held to defendant.	

[fol. 15] IN THE CIRCUIT COURT OF MISSISSIPPI COUNTY

STATE OF ARKANSAS

vs.

JIM DUCKWORTH

JUDGMENT—December 16, 1940

On this the 16th day of December, 1940, the above entitled matter coming on to be heard on the appeal of Jim Duckworth from the Municipal Court of Blytheville, Arkansas, comes the plaintiff by its attorney, Bruce Ivy, and comes the defendant by his attorneys, Cecil Nance and H. R. Ratcliff; and by agreement this cause is submitted before the Court sitting as a jury, said cause being heard upon the stipulations of witnesses' testimony and argument of counsel, and the Court after having heard same finds:

That the defendant is guilty of transporting alcoholic liquors through the State of Arkansas without a permit as charged and is guilty of violating Section 14177 of Pope's Digest of the Statutes of Arkansas; and the defendant's punishment is fixed at a fine of Five Hundred and no/100 (\$500.00) Dollars and costs; and that the defendant's cargo of whiskey consisting of one hundred (100) cases is hereby released from the custody of the sheriff of Mississippi County, Arkansas.

It is therefore by the court considered, ordered and adjudged that the defendant, Jim Duckworth, be and he is hereby fined the sum of Five Hundred and no/100 (\$500.00) Dollars and costs, and the Sheriff of Mississippi County, Arkansas, is authorized and directed to release to the said Jim Duckworth the truck and one hundred (100) cases of [fol. 16] whiskey held by the Sheriff of Mississippi County.

G. E. Keck, Judge.

Criminal Record 4, page 117.

[fol. 17] IN THE CIRCUIT COURT OF MISSISSIPPI COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed December 19, 1940

Comes the defendant, Jim Duckworth, and moves the Court to set aside the verdict and judgment of the Court

heretofore rendered in this cause, and that he be granted a new trial herein because:

- (1) The verdict and judgment are contrary to the law;
- (2) The verdict and judgment are contrary to the evidence;
- (3) The verdict and judgment are contrary to the law and to the evidence.
- (4) There is no evidence to support the verdict and judgment of the Court.
- (5) The Court erred in finding the defendant guilty of a violation of Section 14177 of Pope's Digest of the Statutes of Arkansas. That was error because the said Section does not apply to shipments of intoxication liquors originating in Illinois and consigned and en route to Mississippi, which said shipment is passing through the State of Arkansas with no intention to use said whiskey in any manner within the State of Arkansas.
- (6) If Section 14177 of Pope's Digest of the Statutes of Arkansas be construed to apply to shipments such as the one here involved, that is, a shipment originating in Illinois, destined for Mississippi and merely passing through the State of Arkansas, then said Section 14177 of Pope's [fol. 18] Digest of the Statutes of Arkansas is unconstitutional and void because the said Section is a conflict with Article I, Section 8, Paragraph 3 of the Constitution of the United States.
- (7) The Court erred in finding the defendant guilty of a violation of Section 14177, Pope's Digest of the Statutes of Arkansas, because from all the evidence, the shipment of whiskey involved originating from Illinois was consigned and en route to Columbia, Mississippi, and was merely passing through the State of Arkansas and was interstate commerce between Illinois and Mississippi and the State of Arkansas had not undertaken to and has no authority to regulate, tax, or in any manner interfere with such a shipment of whiskey or levy any tax whatsoever upon same.
- (8) The Court erred in finding the defendant guilty of a violation of Section 14177 of Pope's Digest of the Statutes

of Arkansas and assessing the fine therefor because the uncontradicted proof shows that the owner of the shipment involved made application to the Commissioner of Revenues of the State of Arkansas for a permit to transport the said shipment through the State of Arkansas, and said application was by the said Commissioner of Revenues denied.

Wherefore, defendant moves the Court to set aside the verdict and judgment of the Court herein rendered against him, and that he be granted a new trial.

Respectfully submitted, Jim Duckworth, Deft., by
C. B. Nance, H. R. Ratcliff, Attorneys for Defendant.

[fol. 19] IN THE CIRCUIT COURT OF MISSISSIPPI COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL AND ALLOWING
APPEAL—Filed December 19, 1940

This cause this day came on to be heard upon the motion for a new trial of the defendant, Jim Duckworth, and the Court having heard and considered the same, it is by the Court ordered and decreed that said motion for a new trial be and the same is hereby overruled, to which action of the Court the defendant excepts and prays an appeal to the Supreme Court of the State of Arkansas, which appeal is granted.

And it appearing to the Court that the defendant has deposited with the Clerk the gross sum of Seven Hundred and no/100 (\$700.00) Dollars, which is the amount of the appeal bond fixed by the Court, it is by the Court ordered, adjudged and decreed that the appeal stands perfected.

G. E. Keck, Judge.

[fol. 20] CLERK'S CERTIFICATE OF COSTS OMITTED IN PRINTING

[fol. 21] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 22] IN SUPREME COURT OF ARKANSAS

4205

JIM DUCKWORTH, Appellant,

vs.

THE STATE OF ARKANSAS, Appellee

Appeal from Mississippi Circuit Court, Chickasawba District

JUDGMENT—March 10, 1941

This cause came on to be heard upon the transcript of the record of the circuit court of Mississippi county, Chickasawba District; and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the court that the judgment of said circuit court in this cause rendered be and the same is hereby in all things affirmed with costs, and that, unless appellant shall, within fifteen juridical days, surrender himself to the proper authority in execution of said judgment, his bond be declared as forfeited.

It is further considered that said appellee recover of said appellant all her costs in this court, in this cause expended and have execution thereof.

Record of Proceedings, vol. C-39, page 481.

[fol. 23] IN THE SUPREME COURT OF ARKANSAS

OPINION—March 10, 1941

GRiffin SMITH, C. J.

Jim Duckworth was found guilty of transporting alcoholic liquors through Arkansas without having procured a permit from the commissioner of revenues. He was fined \$500.¹

¹ The cause originated in the municipal court of Blytheville, where it was alleged that liquor had been transported into the state in violation of § 14177 of Pope's Digest [Act 109, approved March 16, 1935]. The municipal court assessed a fine of \$500. The defendant appealed to circuit court.

The judgment recites that the cause was heard ² "upon the stipulations of witnesses' testimony and the argument of counsel". Essentials of the agreed statement are in the margin.³

An appeal involving construction of § 14177 of Pope's Digest was before this court in 1939. Jones v. State, 198 Ark. 354, 129 S. W. 2d 249. In that case the defendant was charged with transporting fifty cases of "taxpaid liquor"⁴ from Illinois to Oklahoma by way of Arkansas.

In the instant appeal it is insisted that in the Jones case the right of Arkansas to tax, regulate, or condition interstate shipments was not properly presented.⁵ It is also

² A jury was waived.

³ The state policeman who made the arrest, if called as a witness, would testify that Duckworth was detained Dec. 11, 1940, on Highway No. 61. In the glove compartment of the Chevrolet truck the defendant was driving were found four half pint bottles of liquor, one of which had been opened. It was not full. In the truck were 100 cases of "liquor", upon all of which the federal tax had been paid but the Arkansas tax had not. The truck displayed 1940 Arkansas motor vehicle license plates. License plates issued by the state of Mississippi were found under the floor mat. In Duckworth's possession was an invoice of Royal Distillers Products, Cairo, Illinois, showing sale December 10 of 100 cases of liquor to Jack Spiers, Columbia, Miss., for \$1,691.25.

It was further agreed that Jack Spiers, if called, would testify that he is in the wholesale whiskey business at "Club Marion", in Columbia, Miss. He held a federal wholesale liquor dealer's permit and owned the truck driven by Duckworth. He had sent Duckworth from Columbia to Cairo with instructions to purchase the liquor. None was intended for sale, gift, or other distribution in Arkansas. On cross examination the witness would testify that the liquor was intended to be sold in Mississippi in violation of the laws of that state. Duckworth and Spiers resided in Mississippi, and neither had a place of business in Arkansas.

⁴ The reference is to federal taxes. The Arkansas strip stamps had not been attached.

⁵ The constitutional question in the Jones case was raised and was presented by able counsel.

urged that the Jones case was based upon *Haumschilt v. State*, 142 Tenn. 520, 221 S. W. 196, and that the Haumschilt case has been overruled by the supreme court of Tennessee.⁶

Counsel for appellant say: "One question, and one only, is presented: that is, Does the state have power to regulate a shipment of liquor which is merely passing through Arkansas in interstate commerce"?

Our answer is that the state does have such right.

In *McCanless, Commissioner, v. Graham* (Tennessee Supreme Court) the proceedings were not under the criminal code. The appellant, engaged in interstate transportation of liquors, was detained on a charge that the commodity was contraband. In the Tennessee chancery court it was held that the statutes⁷ did not authorize confiscation of such property. The department of finance and taxation [fol. 24] had issued a license permitting Graham to transport the liquor. After mentioning that the only act engaged in by Graham "which can in any wise be related to [the Tennessee statutes] was that of transporting intoxicating liquors through dry counties of the state", it was said:

"But, under the stipulation, this was a mere incident of interstate transportation, and if the statutes should be construed so as to prohibit such transportation, they would be void because violative of the commerce clause of the United States constitution * * *. We are further of the opinion, as was the chancellor, that the seizure was illegal because appellee was engaged in interstate commerce".⁸

Consonant with the Tennessee courts, this court has held (*Jones v. State*) that liquor in interstate transit is not subject to confiscation.

Since we determined in the Jones case that the Act of March 16, 1935 (Pope's Digest, § 14177) " * * * makes it

⁶ *George F. McCanless, Commissioner of Finance and Taxation, v. Grover Graham*. Three other cases involving the same question were consolidated. (146 S. W. 2d. 137).

⁷ Chapters 49 and 194 of the Public Acts of 1939.

⁸ In support of this statement the following cases were cited: *United States v. Gudger*, 249 U. S. 373, 63 L. Ed. 563; *United States v. Collins*, 263 Fed. 657; *Whiting v. United States*, 263 Fed. 477; *Preyer v. United States*, 260 Fed. 157; *Surles v. Commonwealth*, 172 Va. 573, 200 S. E. 636.

unlawful for any person to ship or transport, or cause to be shipped or transported, into the state of Arkansas, any distilled spirits from points without the state, *without first having obtained a permit from the commissioner of revenues*,⁹ but three questions are to be determined here: Is such regulation reasonable in view of the state's problem in dealing with the manufacture, sale, and transportation of liquor? Is it a burden on interstate commerce? Does "Into" as used in Act 109 mean "into and out of"?

Although in appellant's motion for a new trial it is alleged that application for permission to move the liquor was made of the commissioner of revenues, and refused, the agreed statement contains nothing to this effect. We must assume, therefore, that no such request was made.

Rules of the department of revenues, promulgated by the commissioner under authority of Act 109 of 1935, (in effect during all of December, 1940)¹⁰ provide that "It shall be [fol. 25] unlawful for any person to ship, transport, cause to be shipped or transported into the state of Arkansas any distilled spirits from *points without the state*"¹¹ without having first obtained a permit from the commissioner of revenues, or his duly authorized agent". This regulation is copied almost verbatim from § 5(a) of Act 109. It must be conceded that the Act is somewhat obscure regarding strictly interstate transportation of liquors; but there is a very definite requirement that before shipments may be brought "into the state" from points "without the state" permission of the commissioner of revenues must be obtained. But, it is argued, this section, and other sections of Act 109 dealing with transportation, have reference to liquors brought from without the state intended for intra-state usage; hence, appellant contends, "into" does not mean into and through, but "into and at rest".

First. Other than Act 109 there is no statute dealing with transportation in the sense contemplated by that measure. It must be assumed, therefore, that the general

⁹ Italics supplied.

¹⁰ New rules, effective February 3, 1941, have been published.

¹¹ The italicized words are underscored in the mimeographed regulations.

assembly intended to cover all requirements, and that the term "into" as used in the Act includes shipments entering the state, but consigned to points within or beyond. This construction is contrary to that of some courts dealing with related transactions, and we adhere to such definition only because it is our belief that the general assembly intended it so, although more appropriate language could have been used.¹²

Second. The commissioner's regulation requiring those proposing to transport liquor through Arkansas to procure a permit is not in excess of authority conferred by the legislature.

Third. The state relies upon *Ziffrin v. Reeves*¹³ to support the commissioner's action, and to sustain the assertion that the regulation does not impose a burden on interstate commerce. In that case it was said by Mr. Justice McReynolds, who wrote the opinion:

"The Twenty-first Amendment¹⁴ sanctions the right of a state to legislate concerning intoxicating liquors brought from without, undeterred by the commerce clause. With [fol. 26] out doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Furthermore, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them".

Facts before the court were that the appellant, an Indiana corporation, had continuously received whiskey from distillers in Kentucky for direct carriage to consignees in Chi-

¹² Contra, see *Ryman v. Legg*, 176 S. E. 403, 179 Ga. 534; *State v. Williams*, 61 S. E. 61, 68, 146 N. C. 618, 17 L. R. A., N. S., 299, 14 Ann. Cas. 562.

¹³ Ky. 1939, 60 S. Ct. 163, 308 U. S. 132, 84 L. ed. 128.

¹⁴ "Sec. 1. The eighteenth article of amendment to the constitution of the United States is hereby repealed. Sec. 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited".

cago. The Kentucky Alcoholic Beverage Control Law of 1938 restricted the agencies by which whiskey might be transported.¹⁵

After commenting upon the power of states to prohibit manufacture, sale, and transportation of liquors, and affirming Kentucky's right to condition transportation, the opinion says:

"We cannot accept appellant's contention that because whiskey is intended for transportation beyond the state lines the distiller may disregard the inhibitions of the statute by delivering to one not authorized to receive; that the carrier may set at naught inhibitions and transport contraband with impunity".

It will be observed that § 2 of the Twenty-first Amendment prohibits the transportation or importation of intoxicating liquors *into* any state, territory, etc., *for delivery or use therein*¹⁶ in violation of the laws of the state.

The agreed statement in the case at bar concedes that the liquor carried by Duckworth was not intended for delivery or use in Arkansas.

It is our view that the Ziffrin case is not altogether in point with the controversy here. The Ziffrin corporation proposed to transport into Illinois liquors manufactured in Kentucky. The Supreme Court of the United States predi-

¹⁵ In sum, counsel for the appellant said: "The complaint charges that the control law is unconstitutional because repugnant to the commerce, due process and equal protection clauses of the federal constitution, in that, under pain of excessive penalties, it undertakes to prevent an authorized interstate contract carrier from continuing an established business of transporting exports of liquors from Kentucky in interstate commerce exclusively. Also: Intoxicating liquors are legitimate articles of interstate commerce unless federal law has declared otherwise. Interstate commerce includes both importation of property within a state and exportation therefrom. Prior to the Wilson and Webb-Kenyon Acts, and the Twenty-first Amendment, the power of the states over intoxicants in both of these movements were limited by the commerce clause. These enactments relate to importations only. Exports remain as always, subject to that clause".

¹⁶ Italics supplied.

cated its holding upon the fact that inasmuch as Kentucky had the right to prohibit the manufacture, transportation, and sale of whiskey, it had, as an incident to its power to prohibit, the right to designate the agencies of transportation as a class, and to prohibit transportation by any other class. This, it was thought, was not a burden upon interstate commerce. Expressed differently, Illinois had no fundamental right to receive liquors from Kentucky; and lacking that right it could not complain of conditions under which limited transportation was permitted.

In the case at bar the commodity originated in Illinois, and its destination was Mississippi. Arkansas was a mere transportation conduit through which it passed. Appellant might have received a permit if he had applied for it; but, more than eighteen months after this court had held such transportation to be unlawful, he arrogated to himself the right to disregard reasonable legal prerequisites, and now complains that our decision places a burden on interstate commerce.

If we concede that some burden has been placed upon such commerce, the answer is that it may be done.

In the recent case of *South Carolina Highway Department v. Barnwell Bros.*, 303 U. S. 177,¹⁷ it was said: "While the constitutional grant to congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not fore-stall all state action affecting interstate commerce. Ever since *Wilson v. Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley v. Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by congress. Notwithstanding the commerce clause, such regulation in the absence of congressional action has for the most part been left to the states by the decisions of this court, subject to the other applicable constitutional restraints".

The distinction (mentioned in a footnote to the *Barnwell Bros.* case and citing *Hall v. De Cuir*, 95 U. S. 485, and other decisions) is this: "State regulation affecting interstate commerce, whose purpose or effect is to gain for those

¹⁷ The opinion was handed down February 14, 1938.

within the state an advantage at the expense of those within [fol. 28] out, or to burden those out of the state without any corresponding advantages to those within, have been thought to impinge upon the constitutional prohibition even though congress has not acted."

After citing and commenting upon former decisions, the court said: "In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the congress permits because it is an inseparable incident of the exercise of legislative authority, which, under the constitution, has been left to the states".

Cooley v. Board of Port Wardens, referred to by Mr. Justice Stone (who wrote the opinion in the *Barnwell Bros.* case) held that the mere grant of the commercial power to congress did not of itself forbid states from passing laws regulating pilotage. In one of the headnotes it is said: "The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others different rules in different localities. The power is exclusive in congress in the former, but not in the latter class".¹⁸

As late as 1935 the Supreme Court of the United States,¹⁹ in a case appealed from the Supreme Court of Alabama, (see footnote) ²⁰ held that state regulations incidentally affecting interstate commerce were not invalid.

¹⁸ A Pennsylvania law provided that a vessel that neglected or refused to take a pilot should forfeit and pay to the master warden of the pilots, for use of the society for the relief of distressed and decayed pilots, their widows and children, one-half of the amount of the regular pilotage. The law was held to be an appropriate part of a general system of regulations on the subject of pilotage, and could not be considered as a covert attempt to legislate upon another subject.

¹⁹ *Clyde Mallory Lines v. Alabama, ex rel. State Docks Commission*, 296 U. S. 261.

²⁰ Headnote to the opinion of the Supreme Court of the United States, after mentioning that art. 1, § 10, cl. 3 of the constitution provides that no state shall, without the consent of congress, lay any duty of tonnage, says that the inhibition embraces taxes and duties which operate to impose a charge for the privilege of entering, trading in, or

In Ouachita Packet Co. v. Aiken,²¹ a case originating in Louisiana and decided in 1887, the court said, at pages 447-448: "In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such, interfere with the regulation made by the states, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority".

New York ex rel. Silz v. Hesterberg, Sheriff, 211 U. S. 31, and Geer v. Connecticut, 161 U. S. 519, are of interest and have application.²²

lying in port. It was then said in effect that invalidity [of the Alabama statute] under this clause depends upon the basis of the exaction, not upon measure by tonnage. This clause does not prevent a reasonable charge to defray the expense of policing service rendered by the state to insure safety and facility of movement of vessels using the harbors. State harbor regulation, and charges to defray the cost, though they may incidentally affect foreign or interstate commerce, are not forbidden by the commerce clause so long as they do not impede the free flow of commerce or conflict with any regulation of congress".

²¹ 121 U. S. 444. Complainants were owners of steam-boats plying between New Orleans and other ports and places on the Mississippi river and its branches in Louisiana. The burden complained of was that the rates of wharfage exacted by the city under state legislative authority for vessels at New Orleans were excessive. Contention was that the charges were unreasonable as wharfage, and in effect a direct burden on commerce. The court said: "The case is clearly within the principal of the former decisions of this court, which affirm the right of a state, in the absence of regulation by congress, to establish, manage, and carry on works and improvements of a local character, though necessarily more or less affecting interstate and foreign commerce".

²² In the Hesterberg case the relator, a dealer in imported game, was arrested for unlawfully having in his possession on March 30, 1905, (being within the "closed" season in the borough of Brooklyn, city of New York) a golden plover lawfully killed in England, and grouse lawfully killed in Russia. They were distinguishable from plover and grouse

The true rule to be applied here is that announced in *Hayes v. U. S.*, C. C. A. Okla. 1940, 112 F. 2d 417. The thirteenth headnote is: "Although the Twenty-first Amendment to the federal constitution surrenders to each state the [fol. 29] power to prohibit or condition importations of intoxicating liquor in interstate commerce into the state, the amendment does not surrender power of congress to prohibit or regulate transportation of intoxicating liquor in interstate commerce, and congress has power to enact legislation to execute [the] amendment and to penalize its violation".

In the absence of action by congress there is no doubt of the right of a state to require those engaged in interstate transportation of liquors—those who use Arkansas highways and other state facilities and who receive its police protection while engaged in such commercial pursuit—to procure from the commissioner of revenues a permit conforming to regulations not inharmonious with Act 109 of 1935. No revenue fee may be exacted for the permit, the only charge being that necessary to defray cost of issuance, police inspection, and necessary reports. The commissioner's refusal or failure to promptly comply in reasonable circumstances would be subject to judicial review and immediate compulsion through mandamus.

Affirmed.

grown in New York. The court said (pp. 40-41): "That a state may not pass laws directly regulating foreign and interstate commerce has been frequently held by the decisions of this court. But while this is true, it has also been held in repeated instances that laws passed by the states in the exercise of their police power, not in conflict with laws of congress on the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws".

In the *Geer* case (p. 534) it was said: "The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected".

[fol. 30] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED
STATES—Filed March 18, 1941

To the Honorable Griffin Smith, Chief Justice of the Supreme Court of the State of Arkansas:

Your petitioner, Jim Duckworth, a resident of the State of Mississippi, respectfully shows:

I

Petitioner is the appellant in the above entitled cause.

II

The appeal in said cause was from a judgment imposing a fine of Five Hundred (\$500.00) Dollars upon petitioner for the violation of Section 14177 of Pope's Digest of the Statutes of Arkansas, which said section prohibits the bringing of intoxicating liquors into the State of Arkansas without a permit from the revenue department of the State of Arkansas.

III

That on appeal from such judgment by petitioner to the said Supreme Court of the State of Arkansas, such court being the highest court of law and equity in such state in which a decision of the matters in controversy could be had, the judgment appealed from was in all effects affirmed by the final judgment entered in the Supreme Court on the 10th day of March, 1941.

IV

That there is error in the final judgment and record of [fol. 31] proceedings in this cause in the said Supreme Court of the State of Arkansas whereby petitioner is aggrieved in that in the decision and judgment of said court there was drawn in question the validity of a statute of the State of Arkansas, namely Section 14177 of Pope's Digest of the Statutes of Arkansas, on the ground of its being repugnant to or in contravention of Article I, Section 8, Paragraph 3 of the Constitution of the United States and

the decision and judgment of the said Supreme Court of Arkansas was in favor of the validity of such statute.

Wherefore, Petitioner Prays for the allowance of an appeal from the aforesaid final judgment of the Supreme Court of the State of Arkansas against petitioner to the Supreme Court of the United States in order that the decision and judgment of the Supreme Court of the State of Arkansas may be examined and reversed, and further prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Arkansas, may be sent to the Supreme Court of the United States, as provided by law.

Petitioner further prays that pending the disposition of the appeal herein prayed to the Supreme Court of the United States, that this Court stay its mandate to the Circuit Court of Mississippi County, Arkansas; that the Court, by appropriate order, fix the security required for said stay.

The errors upon which petitioner claims to be entitled to an appeal are those hereinabove indicated and which are more fully set out in the assignments of error filed herein.

This the 18 day of March, 1941.

(S.) Harold R. Ratcliff, Cecil Nance, Attorneys for Petitioner-Appellant.

[File endorsement omitted.]

[fol. 32] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER ALLOWING APPEAL TO SUPREME COURT OF THE UNITED STATES—March 18, 1941

On this day on reading the petition of Jim Duckworth, the appellant herein, praying for the issuance of an order herein allowing his appeal to the Supreme Court of the United States from the Supreme Court of the State of Arkansas, and it appearing from the said petition and the record of the above entitled cause that there was drawn in question the validity of a statute of the State of Arkansas on the ground that said statute is repugnant to and in conflict with Article I, Section 8, Paragraph 3, of the Constitution of the United States and upon the ground that the said statute

imposes an unreasonable burden upon interstate commerce and it appearing that the decision of this court was in favor of the validity of said statute and that such petition is a proper petition for the issuance of this order,

Now, therefore, it is ordered by the undersigned, the Chief Justice of the Supreme Court of the State of Arkansas, that said appeal be and the same is hereby allowed; and

It is further ordered that the appellant execute to the respondent, the State of Arkansas, his bond with surety to be approved by the undersigned, in the sum of \$250.00 conditioned according to law.

[fol. 33] It is further ordered that pending the disposition of this appeal in the Supreme Court of the United States no mandate will issue from this Court to the Circuit Court of Mississippi County, Arkansas, in this cause, the same mandate being stayed pending the appeal herein.

It is further ordered that the Clerk of this Court, within forty days from this date, make and transmit to the Clerk of the United States Supreme Court under his hand and the seal of this Court, a transcript of the record herein containing a true copy of all material parts of the record herein, which shall be designated by praecipe filed with him by any of the parties hereto.

This 18 day of March, 1941.

(S.) Griffin Smith, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

[fol. 34] IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 18, 1941

Now comes Jim Duckworth, the appellant above named, and respectfully submits that in the record, proceedings, opinion and decree of the Supreme Court of Arkansas in the cause mentioned in the petition herewith presented there is manifest error in this, to-wit:

I

The Supreme Court of Arkansas erred in affirming the judgment of the circuit court of Mississippi county,

Arkansas, which judgment imposed a fine of five hundred dollars and costs upon the appellant.

II

The Supreme Court of Arkansas erred in holding Section 14177 of Pope's Digest of the Statutes of Arkansas (Act 109 of the Arkansas Acts of 1935) to be valid as against the contention that the statute is repugnant to and in conflict with Article I, Section 8, Paragraph 3, of the Constitution of the United States.

III

The Supreme Court of Arkansas erred in holding that the State of Arkansas has authority to regulate, tax, or otherwise burden a shipment of distilled spirits originating in Illinois, and passing through the State of Arkansas en route to its destination in Mississippi where there is no intention to sell, dispose of or in any manner use any portion [fols. 35-36] of the shipment within the State of Arkansas.

IV

The Supreme Court of Arkansas erred in holding the Statute of Arkansas (See. 14177 of Pope's Digest of the Statutes of Arkansas, Act 109 of 1935) to be valid as applied to the shipment of distilled spirits here involved. This was error because the Congress of the United States has exclusive power to regulate interstate commerce, the several States having only such powers in this respect as are expressly granted them by the Congress, and the power to regulate a shipment of intoxicants merely passing through the State has not been granted the State, either by amendment to the Constitution of the United States or act of Congress.

For which errors the appellant above named, Jim Duckworth, prays that the said judgment of the Supreme Court of Arkansas be reversed and a judgment ordered in favor of appellant, and for costs.

(S.) Harold R. Ratcliff, Cecil Nance, Attorneys for Appellant.

[File endorsement omitted.]

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[fol. 37] Cost Bond on Appeal for \$250.00 approved and filed March 18, 1941, omitted in printing.

[fol. 38] Citation in usual form filed March 18, 1941, omitted in printing.

[fol. 39] Clerk's Certificate of Lodgment—Omitted in Printing

[fol. 40] Clerk's Return to Order Allowing Appeal—Omitted in Printing

[fol. 41] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 42] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON, DESIGNATION TO PRINT ENTIRE RECORD AND ACKNOWLEDGMENT OF SERVICE THEREOF—Filed April 8, 1941

Now comes the above named appellant, pursuant to Paragraph 9, of Rule 13, of the Rules of this Court, and states that the points upon which he intends to rely in this Court in this cause are as follows:

Point I

The State of Arkansas has no authority to regulate, tax or otherwise burden a shipment of intoxicating liquors which originates in Illinois and merely passes through Arkansas en route to its destination in Mississippi, where there is no intention to sell, dispose of or in any manner use any portion of the shipment of intoxicants within the State of Arkansas.

Point II

Section 14177 of Pope's Digest of the Statutes of Arkansas (Act 109 of the Arkansas Acts of 1935), as construed by the Supreme Court of Arkansas in this cause, is unconstitutional and void because it is repugnant to and in conflict with Article 1, Section 8, Paragraph 3, of the Constitution of the United States.

[fol. 43]

Point III

The several states have no authority to regulate interstate commerce unless that authority is expressly granted to the states either by amendment to the Constitution of the United States or by an Act of Congress. There is neither an amendment to the Constitution of the United States nor any Act of Congress which grants to the State of Arkansas the power to in any manner regulate or impose a burden upon a shipment of intoxicants in interstate commerce where that shipment merely passes through Arkansas en route from its point of origin in Illinois to its destination in Mississippi.

The appellant further represents that the whole of the record, as filed, is necessary for the consideration of this case, except the bond and citation upon this appeal.

Harold R. Ratcliff, Cecil Nance, Counsel for Appellant.

Service of the foregoing statement and designation and receipt of copies thereof acknowledged this 5 day of April, 1941.

Jack Holt, Attorney General of Arkansas, Jno. P. Streefey, Assistant Attorney General of Arkansas, Counsel for Appellee.

[fol. 44] [File endorsement omitted]

Endorsed on cover: File No. 45,253, Arkansas, Supreme Court, Term No. 904. Jim Duckworth, Appellant, vs. The State of Arkansas. Filed March 31, 1941. Term No. 904 O. T. 1940.

(4223)